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Migration, social security and the law

Observations on the impact of migration policies upon the position of migrants in social security law in Europe.

*Prof. dr. Gijsbert Vonk*¹

1. Introduction

The relationship between immigration and social security is attracting an increasing amount of attention in academic circles. While social scientists are interested in a wide range of questions dealing with the integration of newcomers to society and the effects of migration upon the evolution of the welfare state, lawyers tend to approach this subject from a more technical angle, concentrating for example on describing the different legal positions of foreigners in social security law or on technical legal questions which arise from international co-ordination law. Protecting of the social security rights of migrants raises complex legal problems.

Although lawyers and social scientists are interested in the same subject matter, their approaches differ. This is also reflected in the fact that the two disciplines maintain separate academic networks. However, the differences in approach to the relationship between immigration and social security are not always justified. Indeed, the law and the interventions of courts play a major role in the process of integrating foreigners into the welfare system.² Thus, the legal process is extremely relevant for those who are interested in this process of integration. Conversely, lawyers can gain from learning about the social-political pressures that influence the legal position of immigrants.

This article aims to make a small contribution to narrowing the gap between the legal and sociological analysis of the relationship between migration and social security. It will do so by concentrating upon the role of the law in the evolution of the position of migrants in the welfare system set against the background of state migration policies. The main focus of attention will be upon the extent to which the legal position of different groups of migrants in social security is affected by the nature of the migration policies in operation.

The following approach approached has been adopted. The first section (§ 2) describes the treatment of migrants in the social security system with reference to the evolution of the welfare state itself. It is argued that this evolution tends to favour the protection of migrants, not only where it concerns newcomers to the host state, but even where it concerns the protection of social security rights for persons who move from one country to another. This is reflected in the state of social security law, which abstains from provisions which hinder access to social security or which include specific (national or international) arrangements for the protection of rights for migrants who leave the country. In the second section (§3) the treatment of migrants in the social security system will be discussed with reference to the

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² Cf. Virginie Guiraudon, (2000), *The Mashallian triptych reordered: the role of courts and bureaucracies in furthering migrant rights*. In: M. Bommes and A. Geddes eds., *Immigration and Welfare, Challenging the borders of the welfare state*. London, 72-89.

migration policies pursued by governments. Here a distinction has been made between the specific policies involved: favourable immigration policies, ambiguous immigration policies and restrictive immigration policies. It will become apparent that these immigration policies have a direct impact upon the shaping of the legal position of different groups of migrants in social security, even to the extent that they are amplified by the state of the law. In other words: the level of protection enjoyed by migrants in social security law can be explained by the immigration policies in operation as well as the development of the welfare state itself. Such a conclusion may be interesting enough in itself. But from a normative point of view the question arises as to whether the state of the law should reflect a healthier equilibrium between immigration policies and the protective objectives that are served by the social security system. This question will be discussed in the third and final section (§ 4). It is argued that a better equilibrium can be reached by strengthening the legal guarantees for the treatment of illegal immigrants, asylum seekers and the so-called third country nationals.

2. The treatment of migrants in the social security system against the background of the evolution of the welfare state

2.1 The development of a right to social security

The development of the social security system in the late 19th and 20th century is characterized by the gradual extension of the scope of application of the various benefit schemes, both in terms of categories of protected persons as in terms of the risks and contingencies which are covered. Early social insurance schemes covered only limited categories of wage earners for specific risks such as industrial accidents and occupational diseases, invalidity, old age and death. But gradually the material scope of application was extended to include other risks which are now generally identified with the social security system³ such as medical care, sickness, maternity, unemployment and the burden of children. Likewise, the personal scope of application has constantly widened, first to include all categories of wage earners and subsequently extending to categories of self-employed persons and finally to categories of non-active persons. The way this process of extension of the personal scope of application has taken place varies from country to country. Often a mix of solutions can be found, such as including non-wage earners in traditional social insurance schemes, introducing national insurance schemes which cover the entire population, or creating special benefits (often on a non-contributory basis) for certain categories of vulnerable persons, such as the handicapped, single parents, etc.⁴

The extension of the scope of application is closely connected with the development of the concept of social security. This concept originated in the United States as part of Roosevelt's new deal policy, was further embraced by the Beveridge proposals⁵ during the Second World War and has subsequently been adopted in various international conventions on human rights and national constitutions.⁶ The concept of social security constitutes the expression of the notion that each citizen is entitled to an adequate standard of living and that the state bears responsibility in this.

³ Cf. ILO-Convention nr. 102 concerning minimum standards of social security, 1952.

⁴ Cf. H. Deleeck and B. Cantillon, (1986), *Het waarborgen van een minimuminkomen*. In: F. van den Bosch and A. Dancot-Devriendt eds., *Sociaal en Zeker*. Deventer, 39-57.

⁵ *Social Insurance and Allied Services*, 1942.

⁶ Cf. D.C.H.M. Pieters, (1985), *Sociale grondrechten op prestaties in de grondwetten van de landen van de Europese Gemeenschap*. Antwerpen.

The emergence of the concept of social security has also affected the evolution of social welfare provisions that existed outside the social insurance system in the form of social aid programmes and poor laws. The recognition of the right to an adequate standard of living implied that the granting of aid could no longer be construed as a sort of state charity, but rather as a subjective right to assistance for each citizen. After the Second World War, this realization resulted in the introduction of general social assistance schemes that offer periodical benefits to persons who do not have sufficient resources to cover their costs of living.

A typical characteristic of the right to social security is its *universality*. The right presupposes that persons who are in a vulnerable position should be protected not because of their status as a worker, or because of their nationality, but by virtue of their membership of the society.⁷ To what extent has the universal character of the right to social security had an inclusive effect for migrants?

2.2 *The position of migrants in social insurance schemes: national treatment and the development of international co-ordination law*

The personal scope of application of early social insurance schemes has always been grafted upon the existence of a contract of service with the employer.⁸ Restrictions on grounds of nationality were not necessarily required to delimit the scope of application of the schemes vis à vis other countries. In most of the social insurance schemes of the European states nationality was not an issue, at least where coverage was concerned. Apart from some exceptions this situation has never really changed.⁹ For immigrants the absence of the nationality condition implies that they can be adopted within the social insurance schemes of the host-state, but for them this is not the end of the story. As a result of the specific legal conditions that apply in national legislation, migrants can be faced with all sorts of other disadvantages in claiming benefit rights. The fact that migrants have broken insurance records may lead to reduced pension rights or, where minimum insurance requirements are not met, to no rights at all. Territorial restrictions for the payment of benefits can stand in the way of the payment of benefits abroad, while sometimes entitlement to benefits for non-nationals is made subject to the condition of reciprocity with the country of origin. Such problems can to some extent be alleviated by national legislative efforts, but in the end the realization of true solutions requires the linking together of national social security schemes on the basis of international agreements.

International agreements on the co-ordination of social insurance schemes are almost as old as social insurance itself. The first social insurance agreement was concluded in 1904 between France and Italy and since then a network of bilateral and multilateral treaties has come into being, covering all branches of social insurance and including a number of techniques which are specially designed to protect the rights of migrant workers. This network of social security treaties extends throughout the entire world. The treaties provide *inter alia* for equality of

⁷ The universal character of the right to social security is also expressed by the specific phrasing of this right in international texts on human rights. For example the Universal Declaration on human rights formulates the right to social security to everyone, *as a member of society*. Similarly, the International Covenant on economic, social and cultural rights expresses the *right of everyone* to social security.

⁸ Cf. B. Hepple, (1996), *Welfare legislation and Wage Labour*. In: B. Hepple ed., *The making of labour law in Europe, a comparative study of nine countries up to 1945*. London/New York, 115-153.

⁹ Cf. ILO, (1977), *Social security for migrant workers*, Geneva.

treatment on grounds of nationality, the exportability of pension rights and the accumulation of insurance periods that have been built up in different countries.

It can be argued that the growth of international co-ordination law is a by-product of attempts to encourage labour mobility. This is a solid argument that is further elaborated upon below. But at this stage it must be pointed out that the conclusion of international co-ordination treaties can also be interpreted in the light of social policy notions underlying the social security system. The growth of the body of international coordination law has kept pace with the extension of the scope of protection of the social security systems in general. As the system has gradually opened its gates to all sorts of other vulnerable groups, who were previously unprotected, so it has expanded to include the various categories of migrants who, for one reason or another are unable to reap the full benefits of the existing schemes. For migrants the right to social security could not solely be achieved by unilateral legislative measures; the international coordination of national social security schemes was also necessary. The very existence of the network of international co-ordination treaties emphasizes the universal character of the right to social security. Perhaps the conclusion of a number of world wide conventions within the framework of the ILO for the protection of migrant workers in social security¹⁰ alongside all sorts of other conventions that set minimum standards for social security, would confirm this line of reasoning.

2.3 *The treatment of migrants in social assistance schemes: from nationality to legal residence*

Access to social assistance for migrants was always more problematic than access to social insurance. The fact that the origins of social assistance schemes are based upon the notion of a unilateral charitable obligation, rather than a reciprocal insurance relation between the insured person and the social insurance institutions is largely responsible for this. Initially the poor laws had a strictly local character. For example for a long time the English poor laws did not offer support for persons who were born outside the parish.¹¹ Such persons had to return to the parish of their birth. Similar constructions existed in the Netherlands¹² and in Germany¹³ in the 19th century. Only in the second half of the 19th century were strict local requirements abolished, although this did not end but merely shifted the problem of offering assistance to “strangers”. Similar restrictions that previously existed for persons who were born outside the local communities, were now made applicable to nationals of other states. The nationality requirement was introduced. The prevailing opinion in Europe was that not the host-state but the state of origin was responsible for offering support to the needy.

Since the Second World War the nationality condition has been replaced by the notion of territoriality. This process has taken place gradually through legislative changes and the jurisprudence of the courts. The process of the erosion of the nationality condition in social security law is actually still taking place. The much-discussed *Gaygusuz*-judgement of the European Court of Human Rights of 16 September 1996 is an illustration of this.¹⁴ In this judgement the Court ruled for the first time that unequal treatment in social security solely on

¹⁰ For example ILO Conventions nr. 19 of 1925 (equal treatment in accident insurance), nr. 48 of 1935 (maintenance of acquired rights), nr. 118 of 1962 (equal treatment of foreign nationals in social security) and nr. 157 of 1983 (maintenance of social security rights).

¹¹ A. Ogus and E. Barendt, (1988), *The law of social security*. London, 450.

¹² G.J. Vonk, (1991), *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*. Deventer, 83-87.

¹³ R. Schuler, (1988), *Das Internationale Sozialrecht der Bundesrepublik Deutschland*, 150-151.

¹⁴ ECtHR, (*Gaygusuz/Austria*), *RJ&D* 1996-IV, no. 14, 1129-1157.

nationality grounds constitutes a violation of Article 14 of the European Convention on human rights, unless it is justified by very weighty reasons.

The replacement of the nationality condition by the territoriality condition is in line with the principle that modern states should take responsibility for the social welfare of all citizens.¹⁵ However, in social assistance this principle has never been fully accepted. In almost all European countries the nationality condition and the territoriality conditions are intertwined by establishing links between the right to social assistance and the legality of residence. Here we find a curious form of interaction between immigration law and social welfare law. Entitlement to social assistance depends on the legality of residence, while in its turn the legality of residence may depend upon the foreigner claiming social assistance. Only for those with permanent residence status may such conditions be alleviated. International law does little to improve the legal position of illegal residence in social assistance. The European Convention on social and medical assistance¹⁶ offers some basic guarantees, but under EC-law the reciprocal link between social assistance and residence status is left essentially unaffected.¹⁷

2.4 *Résumé: nationality, territoriality extra-territoriality*

From the above it follows that social security law has gone a long way in accepting migrants within its scope of protection. This is most clearly the case in the field of social insurance, which includes all workers, or sometimes the entire resident population. Social insurance schemes even take into account extra-territorial circumstances by means of a network of bilateral and multilateral social security agreements which co-ordinate the national social security schemes. In the field of social assistance (mostly excluded from international co-ordination treaties) the situation for migrants is considerably improved in view of the fact that the nationality condition has gradually been replaced by the notion of territoriality. However most states require legal residence for the right to social assistance, while immigration law may make the legality of residence dependent upon the condition that the foreigner may not rely upon public funds. In the latter conditions we still find a reminiscence of the 19th century postulate that the host-state is not responsible for the social welfare of immigrants.

In a recent publication *Virginie Guiraudon* reflects upon the process of improved access to the welfare state. In this publication she reacts to those who believe that this process illustrates the advent of *post-national membership* in post war Europe, whereby the enjoyment of rights is no longer linked to nationality, but more and more determined by residence and ‘personhood’ crafted by international institutions and transnational collectivities.¹⁸ In her view the improved treatment of migrants in social security is much rather a consequence of the way national bureaucracies operate and the interventions of the courts. But I have difficulties in seeing a contradiction between the two approaches. The notion of post-national membership has been shaped gradually during the development of the social security system and has progressively been incorporated into (international) law. Once incorporated it is only logical

¹⁵ Cf. G.J. Vonk, (2000), *Social security and property: Gaygusuz and after*. In: Jan Peter Loof, Hendrik Ploeger, Arine van der Steur eds., *The right to property, The influence of Article 1 Protocol no. 1 ECHR on several fields of domestic law*. Maastricht, 145-155.

¹⁶ Concluded on 11 december 1953 within the framework of the Council of Europe.

¹⁷ Cf. A.P van der Mei, *Free movement of persons within the European Community, cross-border acces to public benefits*, 164-173.

¹⁸ Cf. Virginie Guiraudon, (2000), *The Mashallian triptych reordered: the role of courts and bureaucracies in furthering migrant rights*. In: M. Bommers and A. Geddes eds., *Immigration and Welfare, Challenging the borders of the welfare state*. London, 72-89.

that bureaucracies and courts act accordingly. In my view the theory of the advent of post-national membership needs some adjustments on other grounds. The notion of full and equal access to social security for migrants should not be isolated from the pressures that ensue from the specific immigration policies that are conducted by states. This subject is discussed in the section below.

3. The impact of immigration policies upon the legal position of migrants in social security

3.1 When the migration climate is favourable...

When states conclude bilateral agreements on the protection of social security rights for migrant workers they do so on a reciprocal basis. Thus serving the interests of the citizens of both states. But the growth of the network of international co-ordination treaties cannot only be explained with reference to the process of granting reciprocal advantages. Sometimes such treaties predominantly serve the interests of migrants of one country only. This is particularly true for agreements which apply to countries which have provided the European economies with cheap labour during the sixties and the seventies, initially Portugal, Greece and Spain and subsequently countries like Turkey, Morocco, Tunisia, Algeria, the ex Yugoslav republic, etc. Although these agreements were formally based upon the notion of reciprocity, in practice they operated (and still operate) almost exclusively to the benefit of immigrant workers from former recruitment countries.

The expanse of social security relations between the European and North-African states and Turkey is clearly a result of the favourable attitudes that existed towards the immigration of labour. Indeed the official recruitment policy of the past was directly accompanied by the conclusion of social security treaties, thereby making immigration more attractive to workers and offering a package that was acceptable for the sending states.

The standard of protection established in the bilateral treaty regime which applies between Western states and former recruitment countries sometimes falls short of the standards which are commonly developed between the Western European nations themselves.¹⁹ But on the whole these standards cannot be qualified as minimal. Most treaties cover the full extent of co-ordination techniques, i.e. the equality of treatment on grounds of nationality, the totalization of insurance periods and the export of benefits abroad. Interestingly, the protection the social security treaties offer to the nationals of former recruitment countries still continues, even now that the official recruitment efforts vis a vis these countries have long been ended and the attitudes towards labour migration have become very restrictive.

The positive impulse of a favourable migration climate on the development of protective standards in the sphere of social security is mostly manifest in the European Union, in the framework of which the freedom of movement of persons constitutes one of the main treaty objectives. In order to realize this objective art. 39 EC treaty provides a basis for the introduction of measures that are designed to protect migrant workers against social security disadvantages that may ensue from their movement between the member states of the Union.

¹⁹ Cf. Abdellah Boudahrain (2000), The insecure social protection of migrant workers from the Maghreb, *International social security review*, 47-74.

Already in 1958 a comprehensive regulation came into being for the co-ordination of national social security systems. The regulation is presently referred to as Regulation 1408/71.²⁰

Regulation 1408/71 is based upon the same co-ordination techniques that are adopted in bilateral social security treaties, i.e. the prohibition of discrimination on grounds of nationality, export of benefits, totalization of insurance periods and conflict rules for the determination of the applicable legislation. But it has to be borne in mind that -under the influence of frequent changes by the community legislator, but most of all under the influence of the EC Court of Justice- the scope of application and levels of protection are much more developed than any other co-ordination instrument in the world. In the EU the social security protection for migrants is part of the supranational framework of the Union and the powers of its institutions, such as EC Court of Justice. From the onset the Court of Justice has interpreted the co-ordination regulation in the light of the freedom of movement of workers. According to the court, the objective of realizing the most favourable conditions for the freedom of movement infers that legal restrictions that adversely affect social security rights should be set aside. It is this attitude which has led to the constant expansion of Regulation 1408/71 both in term of the scope of application as in terms of the possibility to set aside national legal provisions. Regulation 1408/71 now offers far reaching protection to the EC migrants, covering employed persons, the self-employed, civil servants and students and the entire range of statutory social security schemes, with the exception of social assistance.²¹ The possibilities for the member states to shape the legal position of EC migrants according to their national views and wishes have been drastically diminished.

The exceptional expansion of EC co-ordination law shows to what extent the legal position of migrants in social security can be affected by positive attitudes towards migration, particularly when such attitudes are embodied in the law itself. Interestingly, this effect can (be) equally be demonstrated by the lack of progress in the development of co-ordination law in situations in which migration is not desired and promoted by law. Within the Union the intra-community freedom of movement of persons has not been opened up to third country nationals. Despite the efforts of the European Commission²², Regulation 1408/71 still excludes migrants who are third country nationals from its personal scope of application. Similar lack of progress has been made in the development of co-ordination instruments under the so-called social paragraphs of association and co-operation agreements the EC has concluded with third countries, in northern Africa and Eastern Europe.²³ These social paragraphs provide a basis for the introduction of social security instruments that are based upon techniques comparable to those adopted in Regulation 1408/71. Only in relation to Turkey has such an instrument been developed²⁴, but efforts to apply this instrument by adopting practical implementation measures have been aborted. The result is that the

²⁰ Regulation 1408/71. OJ 1971 L149, supplemented by the implementing Regulation 574/72, OJ 1972 L74, both frequently amended.

²¹ Social assistance is nevertheless subject to the equality of treatment on grounds of nationality as adopted in art. 7(2) Regulation 1408/71. Cf. G.J. Vonk, (1991), *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*, Deventer, 353-360.

²² Cf. Herwig Verschueren, (1998), *The commissions's proposal to extend regulation (EEC) no. 1408/71 to third country nationals*. In: Yves Jorens, Bernd Schulte eds., *European social security law and third country nationals*, 187-208.

²³ Cf. Yves Jorens, (1998), *Non-European Union nationals and the coordination of European social security law; the international agreements concluded by the European Union with third countries and conflict rules in the European social security law*. In: Yves Jorens, Bernd Schulte eds., *European social security law and third country nationals*, 1-109.

²⁴ Decision 3/80 of the Association Council EEC-Turkey.

instrument lacks direct effect.²⁵ The European Court of Justice only recognizes such direct effect for the equality of treatment on grounds of nationality.²⁶ In relation to all other third countries no instruments have been adopted at all. Here too, the only positive news for the third country nationals is that the European Court of Justice considers the equality of treatment clauses in the third country agreements itself as directly applicable. But on the whole, EC co-ordination law for third country nationals has simply not yet come into being.

3.2 *When the immigration policies are ambiguous...*

As a reaction to the oil crisis in 1973/1974 the policies of encouraging labour immigration to Western European states shifted towards restrictive policies. However the introduction of formal restrictive immigration policies did not mean that immigration to Europe came to a stand still. In fact it continued under alternative labels, e.g. family reunification, the arrival of citizens from former colonies or asylum. Mostly these new immigrants came from countries outside Europe. When the economies in Europe improved in the late eighties and the early nineties, the number of immigrants from countries outside the EU increased further. Official immigration policies remained restrictive, but the national labour market situation often forced states to allow labour immigration on a temporary basis. The types of temporary labour immigration vary from seasonal work, employing asylum seekers, secondment, traineeships, etc. The policies with regard to temporary employment of migrants in Europe have been extensively analysed by *Groenendijk* and *Hamsink*.²⁷ The authors qualify the temporary admission of migrant workers in Europe as a compromise between the official politics aiming at the restriction of further immigration and the constant pressure to admit foreign workers. It bridges the gap between the ideology of minimum immigration and the reality of demand for certain workers and the open economies.

For the purposes of this article the term ambiguous migration policy refers to the situation in which formal restrictive policy notions coincide with forms of immigration which are condoned by the state. As mentioned in the introduction, the social security position of migrants in such a situation varies. There is a magnitude of circumstances that determine the social security status: the type of employment, immigration status, the country of origin or nationality, the intensity of international protection, etc. Within the scope of this article it is not possible to give a comparative analysis of the social security position of new migrants in Europe. It is nonetheless possible to refer to a number of causes that explain the complexities involved.

a. International treatment versus national treatment

Recent immigrants tend to come from countries outside the European community. When they have the nationality of former recruitment countries, such as Turkey or the Maghreb, migrants enjoy the full benefits of bilateral social security treaties that were concluded in the past. However, when migrants come from other third countries, very often such treaties are not concluded. This even applies in relation to the former Eastern Block. Although since the fall of the iron curtain there is a steady influx of Eastern-European workers, a comprehensive network of bilateral social security agreements between Western European countries and countries from the former Eastern Block has not come into being.

²⁵ ECJ 10 September 1996, case 277/94 (Taflan-Met), *ECR* 1996, 1085.

²⁶ ECJ 4 May 1999, case 262/96 (Sürül), *ECR* 1999, 1210.

²⁷ Kees Groenendijk and René Hamsink, (1995), *Temporary employment of migrants in Europe*, Nijmegen.

New third country immigrants from Eastern Europe, Asia and Africa often miss the protection which is traditionally offered under international coordination law and are fully dependent upon the treatment which is offered by the host state. The quality of national treatment varies from country to country and benefit scheme to benefit scheme. But in any case the national standard falls far below the international standard, particularly where it concerns the possibility to overcome minimum insurance periods for entitlement to benefit, the possibility to export benefits abroad and of claiming benefits for dependants who live outside the host-state.

The difference in the treatment of migrants who enjoy the protection of international social security agreements and those, for whom social security treaties do not exist, is one of the causes of the differentiation in social security positions. If the quality of national treatment is favourable, i.e. when national social security law allows equal access to benefits schemes and refrains from territorial restrictions, the effects of the absence of international social security treaties for migrants may be limited. But when the quality of national conditions for migrants is poor, then the contrast between those who are protected by international agreements and those who are not becomes more articulate. Interestingly some European states actually seem to base their policies upon this effect. For example, the Netherlands social security system used to have an open relation with the outside world: equal access for newcomers was guaranteed, long term benefits were freely exportable throughout the globe, recipients of benefits abroad enjoyed continued affiliation and child benefits were payable for children residing outside the country. However, in the second half of the nineties, a number of legislative changes were introduced which resulted in an abrupt end to this open character: insurance was systematically linked to immigration status, continued insurance for pensioners abroad was abolished and a total ban on the export of benefits was introduced.²⁸ These measures were taken independently from each other for various reasons. But taken together, the effects of the measures point in the same direction. While the new legislation is often partly or even fully mitigated by EC law and provisions of bilateral social security agreements, it applies in full force to migrants from countries with which the Netherlands has not entered into any social security obligations.²⁹ And intentionally or otherwise, these happen to be the countries in the third world and the East which produce the immigration pressures which the Dutch government tries to curb.

b. Legislature versus judiciary

It can be said that the social security position of migrants balances between two opposing forces. On the one hand states may be inclined to exclude immigrants from social security thereby reducing the long-term costs of immigration and reaffirming the temporary nature of immigration. On the other hand states must find ways to reconcile the phenomenon of temporary immigration with constitutional values regarding equality of treatment and the right to social security for all. These opposing forces often lead to tensions within the legal system between the legislature and the judiciary. When national treatment falls below certain standards migrants can invoke national judicial protection in order to improve their position.

²⁸ Cf. G.J. Vonk (1999), *Eigen land eerst, fort Europa of mondiale plichten*, *Sociaal Maandblad Arbeid*, 393.

²⁹ With regard to the recently introduced export ban, the legislation actually anticipates upon the interplay between national law and international obligations. The idea is not to restrict the payment of benefits abroad as such, but to make the export of benefits dependent upon the existence of international obligations. It is thought that in this way other states will be more prepared to participate in verification measures which are imposed by Dutch social security institutions.

Indeed it is in this area, that courts have played a major role in the integration of immigrants in the welfare state. Famous examples are:

- the judgement of the German *Bundesverfassungsgericht* of 20 March 1979 in which export restrictions for pensions were declared incompatible with the principle of protection of property as embodied in art. 14 of the constitution³⁰;
- the judgement of the French *Conseil Constitutionnel* in which the exclusion of non-EC citizens from non-contributory benefit for the handicapped was considered to be unconstitutional³¹;
- the *Gaygusuz*-judgement of the *European Court of human rights* of 16 September 1996 which dealt with the exclusion of a Turkish national from Austrian unemployment assistance³²;
- and the ruling of the *European Court of Justice* in the *Kziber*-case of 31 January 1991 in which this court ruled for the first time that the non-discrimination clause for social security as adopted in the co-operation agreement between the EC and Morocco is directly applicable in the legal order of the European Community.³³

These cases all constitute typical examples of legal precedents that have given rise to subsequent case law. The abundant jurisprudence stresses the dynamic nature of the law governing the social security position for migrants. When policy measures and legal principles are at odds with each other, the state of the law tends to be volatile and complex.³⁴

c. Group-differentiation

The complexity of the legal position of migrants in social security is further increased in view of the fact that it may differ according to the specific labels under which immigrants enter the country: students, au pairs, seasonal workers, secondment, asylum, refugees, etc. The specific position these groups have in social security law may sometimes reflect the specific immigration policies that are pursued. This situation is clearly reflected in the social security position of asylum seekers. The rigidity with which states attempt to control the influx of asylum seekers has had the effect that in almost all Western European countries they have now been fully excluded from the social security system. I shall come back to this in the next paragraph. Another group of immigrants whose social security position sometimes reflects the immigration policies are workers who are allowed to enter the labour market on a strictly temporary basis. In order to avoid long-term social security costs or perhaps to reaffirm the temporary nature of the employment in the host-state, states sometimes fall back upon constructions that stand in the way of affiliation to the social security schemes. This is clearly the case for German *Werkvertragsarbeitnehmer*. Since 1989 Germany has concluded agreements with a number of Central and Eastern European countries which concern the employment in Germany of project tied workers. Under these agreements German employers (mostly in the building industry) can conclude a *Werkvertrag* with foreign employers who carry out temporary projects in Germany with their own workers. As a rule the projects may not last longer than two years. On the one hand the *Werkvertragsarbeitnehmer* are subject to the standards which are agreed upon in German collective labour agreements, but on the other hand these workers are excluded from affiliation to the German social security system; instead they remain dependent upon the system of their home country.

³⁰ Entscheidungen des Bundesverfassungsgericht 51:1.

³¹ Décision Conseil Constitutionnel no. 89-269 DC.

³² ECtHR, 16 September 1996, *RJ&D*, 1996-IV, no. 14, 1129.

³³ ECJ 31 January 1991, case 18/90, *ECR* 1991, 199.

³⁴ Cf. G.J. Vonk, (1999), *Overijverige rechter of tekortschietende rechter, de rol van rechter en wetgever bij het proces van doorwerking van internationale normen in het sociaizekerheidsrecht*. Deventer.

The practice of continued affiliation to the social security system of the country of origin in the case of posting is a common one.³⁵ In fact the legal foundation for this practice is often provided in international instruments on the co-ordination of social security schemes. The international posting regime in social security is designed to make sure that workers are not constantly confronted with frequent changes in legislation when they work temporarily in other countries. Such changes create short gaps in the insurance records and lead to all sorts of administrative difficulties. When the levels of social security protection between states are comparable, the posting rules for social security may work out very well. But when workers migrate from poor countries to rich Western-European states with highly developed social security systems, one may wonder whether the posting regime operates as a shield against the equal social protection of the workers. Such side effects of the posting rules in social security become more acute when long periods of exclusion from affiliation are accepted. An example of this is offered by the case of the Yugoslavian workers who were employed in the Dutch steel industry in the second half of the seventies and eighties. The initial plan was to allow these workers into the Netherlands for a maximum period of two years under continued affiliation to the Yugoslavian social security legislation. In fact what happened was that the Yugoslavian workers continued to work in the Netherlands after the two years period had elapsed, while the exclusion from affiliation to the Dutch social security schemes remained applicable. No pension entitlements were built up in the Netherlands, no child benefits were payable and in case of sickness and unemployment the workers first had to return to their home country in order to become entitled to benefit. In 1986 the Dutch *Hoge Raad* made an end to these practices.³⁶

3.3 *When immigration policies are unequivocally restrictive...*

When immigration policies are unequivocally restrictive the effect of these policies on the shaping of the legal position of migrants becomes much clearer. This is particularly manifest when one looks at the position of asylum seekers in social security. Throughout the eighties and the nineties the expansion of restrictive measures for the reception of asylum seekers has gone hand in hand with steps to exclude these persons from the regular social security scheme.³⁷ Initially in many countries asylum seekers were still covered by the national social assistance schemes, but gradually separate schemes have been set up, which provide alternative and often very minimal forms of care: benefits in kind, vouchers, pocket money, or in some cases no care at all. The exclusion from social security is often coupled with all sorts of other restrictions with regard to the choice of housing and work. Only some countries impose a time limit upon exclusionary measures. In Belgium this period is short (only three months), in Germany the period is three years or longer; in other countries such limits simply do not exist. Restrictive measures for asylum seekers have been purposefully introduced in order to avoid integration into the society. Furthermore in the eyes of the governments these measures make the respective countries less attractive for the asylum seekers wishing to apply for refugee status.

³⁵ Cf. P. Donders, (1997), *Application of the provisions of Regulation 1408/71 and the issue of posting: facts and problems*. In: P. Schoukens ed., *Prospects of social security regulation*, Leuven/Amersfoort, 49-111.

³⁶ Hoge Raad 25 June 1986, *Rechtspraak Sociale Verzekeringen* 1987, nrs. 26 and 27. For more details see Kees Groenendijk and René Hampsink (1995), *Temporary employment of migrants in Europe*, Nijmegen, 59.

³⁷ For an overview see Roland Bank, (2000), *Europeanising the reception of asylum seekers: the opposite of welfare state policies*. In: Micheal Bommers and Andrew Geddes, *Immigration and welfare, challenging the borders of the welfare state*, London/New York, 148-169.

Rigid exclusions from social security also apply to illegal immigrants. In some countries access to social assistance is completely denied, while other countries only recognize reduced entitlement to certain forms of minimal aid. In practice, this state of affairs often means that local communities or charitable institutions take over the role of providing some form of care and protection. The exclusion of illegal immigrants goes the furthest in the Netherlands, where as a consequence of the so-called “linking act” of 1998 this category is now fully excluded from all public services, including social insurance benefits.³⁸

The state of law in general is such that it is not capable of curbing the process of exclusion of asylum seekers and illegal immigrants. In fact the law rather legitimizes this process. I will give a few examples. The Geneva Convention on the status of refugees prescribes the equality of treatment in the field of social assistance and social security for legally residing refugees. But it is assumed that this right only applies after the national authorities have positively decided upon the refugee status³⁹; the European Convention on social and medical assistance provides rules for the equal treatment in granting assistance, but subject to some further conditions the exclusion of illegal immigrants is not affected⁴⁰; in the *Sürül* case the European Court of Justice ruled that it is contrary to the decision 3/80 of the Association Council EC-Turkey to deny access to social security benefits in Germany to a Turkish citizen on grounds of the residence status when this citizen resides legally on German territory⁴¹, but this ruling can equally be read as an argument to exclude Turkish migrants from benefits when they are *not* legally residing within the territory of the Union.

These examples show that the law functions as a double-edged sword. On the one hand national and international legal provisions support the inclusion of migrants in the welfare state. On the other hand, the conditions under which guarantees are granted may equally operate against the inclusion for certain groups. The legitimizing effect of the law with regard to the exclusion of asylum seekers and illegal immigrants is further enhanced by the efforts of European governments to actively promote the adoption of restrictive clauses in international legal instruments which are relevant for the social security protection of migrants. Thus, the new Euro-Mediterranean Association Agreement EC-Morocco signed in 1996 now reserves the equality of treatment in the field of social security to persons working and residing legally in the territories of the host countries.⁴² A similar restriction has been formulated in the recently adopted Charter of Fundamental rights of the European Union in art. 34(2) dealing with the right to social security for migrants who move within the territory of Europe.⁴³ Such restrictions in important international instruments do little to improve the fate of illegal immigrants, but rather support the policies of exclusion.

4. Conclusion and future perspectives

The analysis above shows how strongly the legal position of migrants in social security is governed by immigration policies. The inclusion of migrants in the social security system can to some extent be explained with reference to the forces that have led to the gradual

³⁸ Cf. Paul Minderhoud (2000), The Dutch linking act and the violation of various international non-discrimination clauses, *European Journal of Migration and Law*, 185-201.

³⁹ K. Hailbronner (1989), *Ausländerrecht, eind Handbuch*, 974.

⁴⁰ Art. 1 European Convention on social and medical assistance, Paris, 1953.

⁴¹ ECJ 4 May 1999, Case 262/96 (*Sürül*), ECR 1999, 1210.

⁴² Art. 66 of the Agreement reads: “The provisions of this Chapter shall not apply to nationals of the parties residing or working illegally in the territory of their host countries”. See OJ EC 2000, L 70/16.

⁴³ Art. 34(2) of the Charter: “Everyone residing and moving legally within the European Union is entitled to social security benefit, and social advantages in accordance with Community law and practices”.

development of the right to social security itself. But in the end it appears that the quality of treatment of migrants in social security law is strongly dependent upon the migration policies conducted by states. Not the existence of migration itself, but rather the desirability of the migration affects the legal position of migrants in social security. Before discussing the implications of this conclusion, I will present a short summary of the findings.

- When the immigration climate is favourable and officially encouraged, the natural tendency of the law is to further strengthen the protection of migrant workers in social security on the whole. The clearest example of this can be found in the European Union where the freedom of movement of persons is enshrined in the EC-treaty. The freedom of movement of persons is coupled by Regulations no. 1408/71 and 574/72 which protect the social security rights of migrants. The European Court of Justice critically scrutinizes the application of these regulations against the background of the treaty objective of the freedom of movement of persons. The system of co-ordination of social security has become an integral part of the legal order of the Union and offers strong guarantees against all sorts of disadvantages, which may arise from migration between the Member States.

- However, when the immigration policies are ambiguous, for example when the labour market situation is such that there is a demand for workers from third countries while the official immigration strategy is a restrictive one, the state of social security law becomes more differentiated. In such a climate, governments sometimes conduct policies to allow labour immigration on a temporary basis and sometimes this is coupled with measures or implicit constructions that deny full or equal access to the social security system. Because such measures may run contrary to legal guarantees that are built into the social security system for migrants, they are vulnerable to corrections by the courts. The situation of ambiguous immigration policies consequently increases the tensions between the legislature and the judiciary, which often occur in the area of granting social rights to migrants.

- Finally, when the immigration policies are unambiguously restrictive the state of the law no longer comes to the rescue of immigrants. On the contrary, The law rather legitimizes the lack of social security protection for specific groups. This is reflected in provisions that exclude for example illegal immigrants and asylum seekers from the social security system. For such categories of immigrants the law now operates as an instrument of exclusion.

Perhaps there is some logic in the link that exists between migration policies and the shaping of the social security position of migrants. Indeed, there is no reason to be moralistic about it. Yet, from the point of view of the guiding principles that govern the right to social security, the state of the law is not very satisfactory. Especially the absence of any legal guarantees for illegal immigrants, asylum seekers and some third country nationals is cause for concern. It is as if these groups are literally *outlawed* by the national and international community. This means that in times when states fall back upon harsh immigration policies they become very vulnerable to further measures which are designed to scale down the levels of relief and protection.

In my view, the right to an adequate standard of living for all infers that there should be at least a minimum standard of protection for migrants, even when official immigration policies do not favour their stay in the host-state. In this respect two recommendations should be seriously taken into consideration by the community of European states or by the European Union itself.

The first recommendation is that together with the introduction of common immigration measures, the European Union should adopt minimum standards for the social protection of asylum seekers. Such minimum standards should include requirements with regard to the quality of housing, the right to work, the choice of residence, and the level of financial benefits. Equally, the minimum standards should formulate a maximum period during which asylum seekers may be made dependent upon special care facilities, in the sense that when this period expires there should be entitlement to regular social assistance benefits. A maximum period emphasizes that the adoption of asylum seekers in special care arrangement is merely intended as a temporary measure for persons who are awaiting the outcome of their procedure. Unfortunately, when we look at the recent Commission proposal for a Council directive on minimum standards of procedures for granting and withdrawing refugee status⁴⁴, no such minimum standards for the social protection have been adopted. However, the recently accepted directive on minimum standards for giving temporary protection to displaced persons, does include obligations in the social field such as the right to suitable accommodation, social assistance and medical care.⁴⁵ The relevant provisions still have a minimum character, but they constitute a step in the right direction. Minimum standards of protection for illegal immigrants could also be taken into consideration, particularly in cases where such immigrants can no longer rely upon the social assistance schemes.

The second recommendation concerns the fate of migrants of third countries who lack any protection under international co-ordination law. So far the power to enter into social security obligations with third states rests entirely with the Member States. The Union has created a framework for the introduction of common co-ordination measures between the EC and third states, but as noted before, progress is slow (if not totally absent). From the point of view of social protection, the situation of immigrants who are allowed to work in the Member States without any protection under international co-ordination law is a dubious one. I was struck by a publication of the ILO, which listed a top 10 of the most exploitative practices of migrants in the world today.⁴⁶ Among all sorts of abuses -such as charging excessive fees on the part of private recruitment agents and the imposing of mandatory transfers of migrant's earnings- the top 10 also refers to the practice of expelling migrants without regard to the social security rights arising out of past employment or residence. The latter practice is typically one that is allowed to exist in the absence of international co-ordination standards. In my view the European Union should impose at least a number of minimum requirements which apply unilaterally to the treatment of third country migrants, such as equality of treatment on grounds of nationality, the exportability of benefits and the alleviation from minimum insurance periods for the right to benefit.

⁴⁴ Document 5000PC0578 of 19 Februari 2001.

⁴⁵ Document 500PC0303 of 19 Februari 2001, art. 12.

⁴⁶ *Protecting the most vulnerable of today's migrants*, Tripartite meeting of experts on future ILO activities in the field of migration, Geneva, 1997, 2.